(3)

No. 93-1660

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF ARIZONA,

Petitioner,

-vs-

ISAAC EVANS,

Respondent.

ON WRIT OF CERTIORARI TO

THE ARIZONA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

This Court has no jurisdiction under 28 U.S.C. § 1257(a) because the Supreme Court of Arizona did not decide a federal question.

ARGUMENT

The State of Arizona has petitioned this Court for certiorari, asserting (Petition at page 2) that jurisdiction lies under the last clause of 28 U.S.C. § 1257(a), which gives this Court jurisdiction ". . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." Specifically, the State of Arizona claims the Fourth Amendment is implicated. (Id. at 3). This is not accurate. There is in fact no federal question in this case, substantial or otherwise.

The matter at hand started out as a possession of marijuana case, after the hapless Mr. Evans was stopped for going the wrong way on a one way street, directly in front of the main police station in Phoenix. After charges were filed, a young public defender filed a Motion to Suppress for Mr. Evans on March 27, 1991. This motion was grounded on the Fourth Amendment to the United States Constitution. However, except for a dissenting opinion in the Arizona Supreme Court this is the last time the Fourth Amendment has even been mentioned in this case. Raising a matter in a state trial court is insufficient to confer federal question jurisdiction on this Court. Beck v. Washington, 369 U.S.

541, 549-554 (1962). This is not a matter of specificity. The Fourth Amendment simply never again played a part in the case until the State of Arizona brought it here.

This started right away. On April 3, 1991, the State filed a 6 page response to the Motion to Suppress in the trial court. The response does not mention the Fourth Amendment.

No reply was filed.

The Motion to Suppress was heard on April 15, 1991, in the Superior Court. A 46 page transcript (RT) was generated. There is no mention of the Fourth Amendment in the transcript. The trial judge said, "Motion to suppress is granted" (RT 46, April 15, 1991) and that is all he said.

The Minute Entry that was created to memorialize this hearing did not mention the Fourth Amendment either. It said, "It is ordered granting defendant's motion to suppress evidence." (Page 3).

The State's timely notice of appeal was filed on May 3, 1991. There is no mention of the Fourth Amendment in the notice.

In Arizona this appeal went to the intermediate Court of Appeals. There the matter was briefed. There is nothing in the State's opening brief about the Fourth Amendment. Nor is there anything about it in the answering brief. Nor in the reply brief.

It is not, then, surprising that when Division One of the Arizona Court of Appeals reversed the trial court on May 19, 1992, it said not a word about the Fourth Amendment. State v. Evans, 172 Ariz. 314, 836 P.2d 1024.

Under the Arizona practice Evans had a right to ask the Arizona Supreme Court for discretionary review at this juncture. He did this by filing a Petition for Review on May 26, 1992. This petition did not mention the Fourth Amendment.

The State responded to this on June 25, 1992. The State did not mention the Fourth Amendment in its response.

On October 6, 1992, the Arizona Supreme Court granted review.

Finally, on January 13, 1994, the Arizona Supreme Court filed an opinion reinstating the trial court's suppression order. State v. Evans, ___ Ariz. ___, 866 P.2d 869. Four of the five members of the court comprised the majority and they did not mention the Fourth Amendment. Justice Martone, in dissent, did mention it, and that was the first time it had been mentioned by anyone since the young lawyer filed the motion years before.

If the State of Arizona wished to bring a federal question here, it had the obligation to preserve the question through the Arizona judicial system. Exxon Corp. v. Eagerton, 462 U.S. 176, 181 n.3 (1983). It has failed to do this and so there is no federal question before this Court.

This Court cannot simply assume that all along everyone in Arizona was talking about the Fourth Amendment, even though no one ever mentioned it. The fact is that Arizona has its own constitutional protections and its own exclusionary rule, and it is a virile one. State v. Ault, 150 Ariz. 459, 724 P.2d 545 (1986). This is not to say that the Arizona Supreme Court relied on the state constitution. All that is clear is that they did not rely on

the federal. It is crystal clear that they did not rely on Fourth Amendment jurisprudence. For the Arizona Supreme Court Justice Zlaket wrote, "It is repugnant to the principles of a free society that a person should ever be taken into police custody because of a computer error precipitated by government carelessness." 866 P.2d at 872. This generalized reliance on the principles of a free society is hardly reviewable by this Court.

CONCLUSION

Because there is no federal question in this case Evans asks that Arizona's petition for a writ of certiorari be denied.

Dated this 26th day of April, 1994.

Respectfully submitted,

By _____

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